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IN THE

Supreme Court of the United States

October Term, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
Petitioners,

v.

TERRI LEE HALDERMAN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR CONGRESS OF ADVOCATES FOR THE RETARDED, INC., CALIFORNIA ASSOCIATION OF STATE HOSPITAL PARENT COUNCILS FOR THE RETARDED, NEBRASKA CHAPTER OF MENTAL RETARDATION ASSOCIATION OF AMERICA, INC., PARENT ASSOCIATION FOR THE RETARDED OF TEXAS, THE MENTAL RETARDATION ASSOCIATION OF MISSOURI, INC., PARENTS AND FRIENDS OF CONNECTICUT RETARDED CITIZENS, HOME AND SCHOOL ASSOCIATION OF SOUTHBURY TRAINING SCHOOL, MANSFIELD PARENT'S ASSOCIATION OF THE MANSFIELD TRAINING SCHOOL, BELCHERTOWN STATE SCHOOL FRIENDS ASSOCIATION, FERNALD LEAGUE, PARENTS AND FRIENDS OF MONSON DEVELOPMENTAL CENTER, SUNLAND PARENTS AND FRIENDS, BEATRICE STATE DEVELOPMENTAL CENTER ASSOCIATION, PARENTS ASSOCIATION OF ST. LOUIS STATE SCHOOL AND HOSPITAL, INC., FRIENDS OF RAINEAR, FRIENDS OF FIRCREST, LAKELAND VILLAGE ASSOCIATES, AND FRIENDS OF YAKIMA VALLEY SCHOOL, AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF CONGRESS OF ADVOCATES FOR THE RETARDED, INC., *et al.*

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Congress of Advocates for the Retarded, Inc. ["The Congress"] and the organizations named in paragraph 2 hereof, move for leave to file the attached brief *amici curiae*.[1]

1. The Congress is a national non-profit corporation organized under the laws of the District of Columbia, with more than three thousand members. Each of its officers and directors is a parent or other immediate relative of a retarded individual. Among the purposes of the Congress declared in its charter are "advanc[ing] the interests of mentally retarded persons in achieving appropriate education, housing, medical and other services . . . and, in particular, . . . assur[ing] the continued availability of an appropriate range of institutions and other facilities for the perpetual care, shelter, treatment and education of the mentally retarded. . . ."

2. California Association of State Hospital Parent Councils for the Retarded (CASH-PCR) is a non-profit organization. Each of California's nine state hospitals serving the retarded has a supportive non-profit association composed of parents, relatives, friends and advocates of the retarded residents. The Board of Directors of CASH-PCR includes the President Representative of each of those nine associations. CASH-PCR is engaged in efforts to improve the quality of programs for the retarded both in institutions and in the community. The Nebraska Chapter of the Mental Retardation Association of America, Inc. is a non-profit organization of parents and relatives of mentally retarded people throughout that State. A particular concern of the organization is the lack of adequate care in many

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[1] All petitioners consented to the filing of this brief, and the respondent United States indicated it expected to consent. But counsel for respondents Terri Halderman, et al. refused to consent unless provided an advance copy of a draft or outline of the proposed brief. Time constraints precluded satisfying that request.

community-based residences for the retarded in Nebraska, and the importance of preserving and improving needed residential institutions. Each of the other *amici* is a non-profit organization of parents, relatives and other advocates of the interests of retarded persons presently residing in particular public institutions. The Parent Association for the Retarded of Texas, the Mental Retardation Association of Missouri, Inc., and the Parents and Friends of Connecticut Retarded Citizens represent the interests of retarded people at state institutions throughout their respective states; and the following *amici* represent the interests of retarded people at the institutions identified in the organizations' names: the Home and School Association of the Southbury Training School and the Mansfield Parent's Association of the Mansfield Training School, both in Connecticut; the Belchertown Friends Association, Fernald League, and Parents and Friends of Monson Developmental Center, all in Massachusetts; the Sunland Parents and Friends, Orlando, Florida; the Beatrice State Developmental Center Association, in Nebraska; the Parents Association of St. Louis State School and Hospital, Inc., in Missouri; and the Friends of Rainier, Friends of Fircrest, Lakeland Village Associates, and Friends of Yakima Valley School, all in Washington.

3. The court below has construed the Developmentally Disabled Assistance and Bill of Rights Act (hereinafter "the Act") to empower the federal courts to transfer retarded persons out of institutions to the "least restrictive environment" in which care can be provided. 612 F.2d at 103-107. And, the court further held that in implementing that power, "the court or Master should engage a presumption in favor of placing individuals in community living arrangements ('CLAs')" rather than in institutions, with institutionalization to be permitted only in an "extreme situation." *Id.* at 115-116.

4. Although couched in terms of a "right," this presumption will result in the removal from institutions of

many retarded people who do not desire removal, and for whom removal is disadvantageous. The decision does not require the consent of a retarded individual, or of his parents or guardian, as a condition to his deinstitutionalization. Retarded people generally lack the capacity for meaningful participation in the judicial proceedings which, under the ruling below, will determine their fates. Consequently, in class litigation of the sort approved below, if a retarded person has no parent or other advocate to contest removal from the institution, the presumption will result in deinstitutionalization even when that course is not desired and is contrary to the individual's interest. Where a retarded person *does* have parents or other advocates who challenge the proposed removal, under the ruling below they will not be able to prevent removal except by participating in individual judicial hearings and battling uphill against the presumption. Given the disagreements among experts in this area, there will be many cases in which the evidence is equivocal, and in such cases the presumption will mandate deinstitutionalization. Finally, the decision below may prompt state and local governments to undertake "voluntarily" an across-the-board movement of retarded people from institutions to CLAs, rather than face protracted litigation in which the advocates of broad-scale deinstitutionalization would enjoy a presumption in their favor.

5. *Amici* recognize the value of community living arrangements for many retarded people, and support efforts to improve all facilities for the retarded, both CLAs and institutions. But *amici* believe that for many (particularly the severely and profoundly retarded and those with multiple handicaps), CLAs are not an appropriate alternative to institutions. *Amici* know first-hand the enormous diversity in the conditions, capabilities, and needs of retarded persons, and they seek to assure the continued availability of a full spectrum of facilities and services from which retarded persons, together with their parents or responsible advocates and professionals, can select the means of habilitation best suited to each individual. By requiring courts

to apply a presumption in favor of one type of facility, the decision below frustrates that objective.

6. *Amici's* brief shows that there is no justification in the Act for creating a presumption in favor of CLAs, a showing which they fear may not be fully presented by the parties who will likely concentrate on the threshhold question whether the "Bill of Rights" provision of the Act (42 U.S.C. § 6010) is judicially enforceable. In addition to discussing the statutory language, structure and history which show that Congress intended no presumption, *amici's* brief presents a balanced view of the state of professional knowledge and opinion regarding the nature of the disabilities suffered by the mentally retarded residents of public institutions, and of the relative capacities of institutions and CLAs to provide the treatment and habilitation they need. This material is important, for it defines the real world about which Congress was legislating, (cf. *United States v. Maher*, 307 U.S. 148, 155) and thus facilitates understanding of the Act's language and purpose.

7. The court of appeals believed that testimony introduced at the trial of this case established the inherent superiority of CLAs over institutions. See 612 F.2d at 93, 113-114. However, all of the litigants apparently desired, albeit for varying reasons, that Pennhurst ultimately be closed (see Pet. App. 135a). None sought to establish the value of institutions as facilities for habilitation. Petitioner Pennhurst Parents-Staff Association wished to correct that defect in the record, but was denied intervention. Thus, on the question here presented the lower courts received only one point of view. As *amici's* brief demonstrates, the result was a slanted perception of the condition, capacities and needs of those retarded persons who presently reside in institutions, a misperception which led the courts to misconceive the intent of Congress.

CONCLUSION

Because *amici* have a substantial interest in this case, and

their brief addresses an important issue before the Court which the parties are not likely to treat in full, this motion for leave to file a brief as *amici curiae* should be granted.

Respectfully submitted,

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> services were provided in a large institution . . . A large residential facility is frequently a self-contained unit that provides its own schools, medical facilities, power, water, waste disposal, roads, etc. . . . [and] operate[s] on a small scale compared to populations given these services in the communities. Facilities located in the community, therefore, will usually be able to purchase these services at a [lower] cost . . . .
>
> . . . .
>
> (2) Since small facilities can be specialized, only those services needed by . . . [the retarded] in each facility need to be provided. In large institutions the retarded are compelled to accept the full range of custodial services.

R. Conley, *The Economics of Mental Retardation,* 356, 357 (1973).

Dr. Conley's findings and conclusions are supported by a study recently undertaken by the State of Nebraska. The Directors of the Departments of Public Institutions and Public Welfare of that state retained Touche Ross & Company to study the costs to serve retarded citizens in the community and in Nebraska's only institution for retarded people, Beatrice State Developmental Center. In particular these consultants were asked to study and address, among others, the following questions:

1. What is the cost of serving clients in Beatrice State Developmental Center (BSDC) and in each of the Community Based Mental Retardation Regions (CBMR)?

2. What is the potential financial impact of the placement of BSDC clients into the CBMR?

The study concludes that, on the average, it is less costly to serve a retarded person in the community than in BSDC. Some of the explanations given for this conclusion include:

1. BSDC, as an institution, has a high proportion of relatively inflexible overhead costs (building maintenance, grounds, utilities, medical, administration, etc.)

2. Community residential programs utilize direct care staff to accomplish home maintenance chores such as cooking and cleaning. Often the CBMR client will participate in these activities as a part of a residential living skills program. BSDC employs over 150 food service and custodial workers in addition to its direct care staff.

3. Community programs integrate high need clients into residential facilities serving predominately moderate need clients without increasing staff.

4. CBMR residential programs have the flexibility to recognize the clients' independent living skills. As a result, the community programs have the opportunity to serve higher skilled, lower need clients in less costly programs. This is not true at the institution.

The study also concludes:

> Thus, not only are current costs per client less in the CBMR [Community Based Mental Retardation] Regions than BSDC [Beatrice State Developmental Center], but also the opportunity exists that costs may be reduced further in the CBMR Regions as clients achieve community living skills.

State of Nebraska, Cost Study of the Community Based Mental Retardation Regions and the Beatrice State Developmental Center, 4 (August 15, 1980).

This same conclusion was also predicted by the State of Michigan's Joint Committee to Study Abuse in State Mental Health Facilities. According to them:

> Although cost effectiveness studies comparing institutional treatment with coordinated community care do not exist, every indication is that, because community placement promotes more rapid movement to higher levels of functioning for mentally retarded persons than does institutional care, costs over the long term should decrease more quickly than for institutional care for a similar period.

Report to the Michigan 79th Legislature, Regular Session of 1978, 7 (December 14, 1978).

Connecticut has offered no support for its assertion that the *Pennhurst* orders will be burdensome on the taxpayers of this state. Indeed, the available data and the findings of the District Court in *Pennhurst*[25] point to the opposite conclusion.

CONCLUSION

For the foregoing reasons *Amici* urge the Court to affirm the decision of the Court below.

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[25] *Halderman* v. *Pennhurst,* 446 F. Supp. 1295, 1312 (1977).